# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 16, 2014 |
| v | No. 310321<br>Oakland Circuit Court |
| JAY LEE HOLMES,<br><br>Defendant-Appellant. | LC No. 2011-238085-FH |

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant, appeals as of right his jury trial conviction for first-degree home invasion, MCL 750.110(2)(b). The trial court sentenced defendant as a fourth-habitual offender, MCL 769.12, to 15 to 60 years' imprisonment for the first-degree home invasion conviction. We affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

The victim and defendant met in 2004, were involved in a romantic relationship for eight to ten years and had one child together. With the exception of the time when defendant was in prison, defendant and the victim lived together in various places throughout their relationship. In the late winter or early spring of 2011, after defendant was released from prison, defendant and the victim lived at the victim's mother's house and defendant started helping the victim care for the child. However, defendant was asked to leave after his abusive behavior started to escalate. At that point, the victim realized that the relationship was not going to work and she moved into her own condominium in Waterford. Even so, defendant stayed with the victim for approximately one to two weeks after she first moved in to her new condominium. She then told defendant that she did not want to be in a relationship with him, and did not want him to live with her. The victim continued to encourage defendant to spend time with their son. When he came over, he would have to knock on the door as he did not have a key and his name was not on the lease.

At about 1:00 a.m., on July 4, 2011, the victim escorted a male friend out of her condominium and then secured the door with a deadbolt lock. She made the child a snack and took it to him in the living room. Several minutes later, defendant kicked the victim's front door open. He dislodged the doorframe, dented the door, and bent the deadbolt. Defendant punched the victim in the face repeatedly and said, "[h]ow could you have him around my son?" He grabbed her by the neck, and smashed her head against the wall, putting a hole in the wall.

The jury convicted defendant of first-degree home invasion and domestic violence and he was sentenced as outlined above. He now appeals as of right.

## II. JURY INSTRUCTIONS

Defendant first argues that the trial court erred in refusing to instruct the jury on the necessary lesser-included offense of third-degree home invasion. We disagree.

"This Court reviews de novo claims of instructional error." *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009). "Jury instructions that involve questions of law are [] reviewed de novo. But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (internal citations and quotation marks omitted).

"A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense." *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). However, "jury instructions must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence." *People v Kurr*, 253 Mich App 317, 328; 654 NW2d 651 (2002).

The elements of first-degree home invasion are: (1) breaking and entering a dwelling or entering a dwelling without permission; (2) intending when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling committing a felony, larceny, or assault; and (3) while entering, present in, or exiting the dwelling, the defendant is armed with a dangerous weapon or another person is lawfully present in the dwelling. *Wilder*, 485 Mich at 43. Here, the amended information charged that defendant "did break and enter, a dwelling located at 755 E. Alpha Parkway, and while entering, present in, or exiting did commit an assault, and while entering, present in, or exiting the dwelling [the victim], was lawfully present therein."

It is true that, in some circumstances, third-degree home invasion is a lesser included offense to first-degree home invasion and courts must limit their analysis to the particular elements at issue in the case. *Id.* at 44. The alternative elements of third-degree home invasion can be broken down as follows:

Element One: The defendant *either:*

1. breaks and enters a dwelling or

2. enters a dwelling without permission.

Element Two: The defendant:

1. intends when entering to commit a misdemeanor in the dwelling, or

2. at any time while entering, present in, or exiting the dwelling commits a misdemeanor, or

3. while entering, present in, or exiting the dwelling violates any of the following ordered to protect a named person or persons:

a. probation term or condition, or

b. parole term or condition, or

c. personal protection order term or condition, or

d. bond or bail condition or any condition of pretrial release. [*Wilder*, 485 Mich at 43-44.]

A third-degree home invasion instruction was not proper because defendant did not dispute the elements that elevated his crime from third-degree home invasion to first-degree home invasion. A necessary lesser-included offense is proper when "the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support [the instruction]." *Cornell*, 466 Mich at 357. The two factual elements that elevated defendant's crime to first-degree home invasion were: 1) committing an assault or intending to commit an assault; and 2) the presence of another person who was lawfully in the home. Defendant did not dispute either of these elements. There was uncontroverted testimony that defendant assaulted the victim and that the victim was present in her home. Defendant admitted to both of these elements in his letters to the victim following his arrest. Therefore, a rational view of the evidence does not support a third-degree home invasion instruction.

Defendant next argues that the trial court's failure to instruct the jury on defendant's lawful presence defense was reversible error. We disagree.

This Court reviews unpreserved nonconstitutional errors for plain error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Under a plain error analysis, "the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *Id.* "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id*.

Defendant waived this issue. "Waiver is the intentional relinquishment or abandonment of a known right," and waiver extinguishes any error. *People v Buie*, 491 Mich 294, 305; 817 NW2d 33 (2012) (quotation marks omitted). Here, defense counsel expressly agreed to the jury instructions and therefore, this issue is deemed waived. Moreover, even if we were to determine that there was error, the error was not outcome determinative. There was a substantial amount of testimony that defendant did not live in the home. The victim had ended her relationship with defendant a month earlier. He had to break down the door to enter. Defendant's name was not on the lease, he did not have a key, and the utility bills were in the victim's name.

## III. AMENDMENT OF THE INFORMATION

Next, defendant argues that his due process rights were violated when the trial court constructively amended the information by instructing the jury that defendant must have intended to commit the assault. We disagree.

"Constitutional questions are reviewed de novo." *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009). Appellate courts review unpreserved constitutional issues "under the plain-error standard." *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004) (citations omitted).

"In a criminal case, due process generally requires reasonable notice of the charge and an opportunity to be heard." *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). "[T]o establish a due process violation, a defendant must prove prejudice to his defense." *Id.* at 700.

Defendant had reasonable notice of the charge against him. Defense counsel received a copy of the jury instructions at the beginning of the trial and the jury instructions indicated that the jury would be deciding if defendant committed the assault. Defendant clearly had notice of the charge before trial. Even if defendant did not have notice that the charge would be intent to assault the victim, rather than the assault itself, defendant cannot prove prejudice. There was strong evidence that defendant intended to assault the victim. A defendant's "intent may be inferred from all of the facts and circumstances," and "minimal circumstantial evidence is sufficient" to prove intent. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). The victim testified that defendant violently broke down the door and immediately attacked her on entering the home.

## IV. OFFENSE VARIABLE SCORING

Defendant argues that the trial court's improper scoring of offense variable 10 (OV 10) and offense variable 19 (OV 19) requires this Court to remand to the trial court for resentencing. We disagree.

"[T]he circuit court's factual determinations [on a scoring issue] are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Additionally, "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

### A. OV 10

"Pursuant to MCL 777.40(1)(b), a trial court may assess 10 points for OV 10 if the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." *People v Brantley*, 296 Mich App 546, 554; 823 NW2d 290 (2012) (citations omitted). A domestic relationship is "a familial or cohabitating relationship." *Id.* (citations omitted).

The record supports the trial court's assessment of 10 points for OV 10. Although defendant may not have lived with the victim at the time of the assault, they had an extensive relationship, spanning nearly ten years. They had a child together and, with the exception of the years in which defendant was in jail, they lived with one another. The victim admitted that she and defendant were sexually active when she first moved into the condominium and that he had been staying there. The assault took place only weeks after they "broke up," providing the trial court with adequate record evidence to assess 10 points under OV 10.

### B. OV 19

"Ten points are assessed under OV 19 if the defendant interfered with the administration of justice, but did so without the use of force or a threat of force." *People v Smith*, 488 Mich 193, 201; 793 NW2d 666 (2010). "[P]ostoffense conduct may be considered when scoring OV 19." *Id.* at 200. "The phrase 'interfered with or attempted to interfere with the administration of justice' is broad." *People v Steele*, 283 Mich App 472, 492; 769 NW2d 256 (2009). "A threat is not required." *Id*. at 493. A defendant need only "attempt . . . to diminish his victims' willingness and ability to obtain justice." The acts do not necessarily have to rise to level of "independently chargeable acts." *People v Ratcliff*, 299 Mich App 625, 632; 831 NW2d 474, vacated in part on other grounds ___ Mich ___' 838 NW2d 687 (2013).

Defendant wrote the victim several letters from jail asking her to testify that he lived with her during the incident. He also asked her to refuse to come to court to testify against him. Defendant knew that the victim was susceptible to his asking her forgiveness. Therefore, the trial court properly scored OV 19 at 10 points for defendant's attempt to diminish the victim's willingness and ability to obtain justice.

## V. SUBSTITUTION OF COUNSEL

In defendant's supplemental brief, he argues that the trial court erred by refusing to provide him with substitute counsel. We disagree.

"A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (internal citations and quotation marks omitted).

"Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id*. (internal citations and quotation marks omitted).

At the pretrial hearing, defense counsel made a record of the fact that she discussed the likelihood of conviction with defendant. She then asked defendant:

> [a]nd do you wish for me to continue on your trial and be here Monday to go to trial? The reason I ask is, at one point he had filed a motion asking for new counsel. I'm not asking to be removed from the case, I don't know that any attorney – it's not going to change the offer -- . . . So I just wanted to put on the Record that if he is agreeing with that or if he wanted to place an objection to that on the Record.

The trial court indicated that it had a policy of refusing to substitute counsel the day of the trial. Defendant did not object or make any record that he wanted to substitute counsel when given this opportunity.

On the day of trial, defendant requested that the trial court assign him a new lawyer. The trial court responded, "I don't grant changes of lawyers on the day of trial, because everybody who doesn't want to go to trial asks for a new lawyer." The trial court indicated that it would have permitted

defendant to substitute his counsel at the pretrial hearing, but that he had refused. It also indicated that defendant was just trying to postpone his trial.

There was no good cause to substitute counsel. Defendant alleges that his relationship with defense counsel had broken down because she refused to answer his letters, failed to investigate his proposed witnesses, and had not spoken to him about the case. However, the record indicates that defense counsel was attempting to work with defendant, who was a demanding client. Defense counsel indicated that the relationship was somewhat difficult because defendant "does a lot of research on his own and some of it is accurate and some of it is not." She advised defendant to take a plea because she believed that he was likely to be convicted. She requested the trial court adjourn the proceedings in order that defendant could find witnesses to testify on his behalf. She also requested that the court not allow the prosecution to call defendant's son, because defendant did not want his son involved. Defense counsel explained to defendant on the record why the lesser-included third-degree home invasion instruction was unlikely to be appropriate.

Furthermore, there is some indication on the record that defendant's reason for asking for a substitution was to delay trial. Defendant remained silent when defense counsel gave him a direct opportunity to object and request new counsel at the pretrial hearing. He also did not request new counsel, after the trial court indicated that it would not consider any substitution of counsel requests the day of trial. Therefore, the trial court did not err by refusing to substitute defendant's counsel.

## VI. PROSECUTORIAL MISCONDUCT

In defendant's supplemental brief, he also argues the prosecutor knowingly and willingly used false testimony to convict defendant. We disagree.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). This Court will reverse only if "the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

"[A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). "If a conviction is obtained through the knowing use of perjured testimony, it must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (citations omitted). "[A] prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility." *Gratsch*, 299 Mich App 604, 619; 831 NW2d 462 (2013). Reversal is not justified when the prosecutor does not attempt to conceal any contradictions in the testimony, and defense counsel is given ample opportunity to impeach the witness's credibility with the prior statements. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998).

The prosecutor did not knowingly present false testimony. The victim's statements to police regarding her relationship status with defendant, and the police officer's testimony regarding the blood on the wall support the victim's trial testimony. Furthermore, the prosecution is not required to disbelieve a witness's trial testimony based only on the fact that there is other contradictory testimony.

*People v Lester*, 232 Mich App 262, 278; 591 NW2d 267 (1998). Additionally, defendant had ample opportunity to cross-examine the victim on her prior testimony.

The prosecutor's failure to inform defense counsel that the victim's trial testimony would be slightly inconsistent with her preliminary examination testimony was not a due process violation. "[D]ue process [also] requires that a prosecutor is under a duty to disclose any information that would materially affect the credibility of his witnesses." *Gratsch*, 299 Mich App at 621. In order to establish this type of violation, a defendant must prove, among other things, "that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence." *Id.* (citations omitted). Defense counsel knew or could have easily obtained this information herself by interviewing the victim before trial. Defendant was aware that the victim would be testifying at trial.

## VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues, in his supplemental brief, that defense counsel failed to provide defendant with the effective assistance of counsel. We disagree.

"Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

To establish that a defendant's trial counsel was ineffective, the defendant must prove that: "(1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.* at 187. A defendant must also establish that the proceedings were fundamentally unfair or unreliable. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Trial counsel is not required to argue a meritless position or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

### A. FAILURE TO CALL WITNESSES

Defendant argues that counsel was ineffective for failing to investigate and call witnesses who could have testified that he lived with the victim. We disagree.

"'Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses.'" *People v Marshall*, 298 Mich App 607; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013), quoting *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *Chapo*, 283 Mich App at 371, quoting *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (internal citations and quotations omitted).

Defendant waived any error on this issue. "Waiver is the intentional relinquishment or abandonment of a known right." *Buie*, 491 Mich at 305 (quotation marks omitted). Both defense counsel and the trial court gave defendant the opportunity to adjourn the trial in order to subpoena and call witnesses on his behalf. Defendant stated that he wanted to proceed to trial without witnesses. "[A] defendant must raise objections at a time when the trial court has an opportunity to correct the error and

cannot harbor error as an appellate parachute." *Id.* at 312 (citations omitted). Therefore, defendant is precluded from claiming this as error on appeal. *Id.* at 305.

B. FAILURE TO MEET WITH DEFENDANT BEFORE TRIAL

Defendant also argues that he was completely denied the assistance of counsel because his attorney failed to meet with defendant before trial. We disagree.

"It is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal." *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). A critical stage is "where counsel's absence might harm defendant's right to a fair trial." *Buie*, 298 Mich App at 61.

First, defendant was not completely deprived of the right to counsel at any critical stage of the proceeding. Defendant admits that defense counsel met with him at least once at jail, and consulted with him when she was first appointed to represent him, at the preliminary examination, at a hearing on October 11, 2011, and at the pretrial. Therefore, automatic reversal is not warranted.

Second, even if defense counsel's pretrial meetings with defendant fell below an objectively reasonable standard, it was not outcome-determinative error. Defense counsel came prepared for trial, had knowledge about the facts of the case, offered to call witnesses, presented a defense, and cross-examined the victim. Therefore, the record indicates that any failure to meet with defendant for additional time before trial did not prejudice defendant.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly